IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 38 OF 2005

Amit @ Bapu Nanasaheb Bhandwalkar ..Appellant
(Org.Accd.No.2)

Vs.

The State of Maharashtra ..Respondent.

Ms. Pranali Kakade for appellant.
Mr. Vijay Sawant, Spl. P.P. with Ms. P.H. Kantharia, APP for State.

CORAM: B.H. MARLAPALLE &
SMT.R.S. DALVI, JJ.

Date of Reserve : August 23, 2006.

Date of Pronouncement : September 08, 2006.

JUDGMENT (PER MARLAPALLE,J.):

1. As directed by us vide our order dated 5/5/2006 partly allowing Criminal Application No.4389 of 2005 filed in Criminal Appeal No.38 of 2005, the learned Additional Sessions Judge at Pune has recorded his findings regarding the age of the appellant and has held vide his order dated 13/7/2006 that the appellant could not prove that he was born on 6/7/1983 as claimed by him in Criminal Application in this appeal.

2. The appellant examined in all four witnesses and the prosecution examined two witnesses before the learned Additional Sessions Judge. The witnesses examined by the appellant in support of his case were, (i) Bhagwanrao Bhivrao Pawar, Principal of Purandar Jr. Vocational College, Saswad, (ii) Sanjay Haribhau Khedkar, Gram Sevak, village New Kopare where the appellant was born, (iii) Mrs. Shaila Nanasaheb Bhandwalkar, the mother of the appellant and (iv) Mr. Sushant Nanasaheb Bhandwalkar, the younger brother of the appellant. The prosecution on the other hand examined Mr. Sudhakar Bhaiyasaheb Salunke, Head Master of Nav Bharat High School, Shivane and Mr. Ashokkumar Dagdu Kshirsagar, API, Shikharapur, who had inquired into the claim of the appellant regarding his date of birth as per the directions issued by this court in Criminal Application No.4389 of 2005 and submitted an affidavit on 29/8/2005. The first witness of the defence Mr.Bhagwanrao Pawar stated that the appellant had taken admission in Purandar Jr. Vocational College, Saswad on 5/7/1999 on the basis of the school leaving certificate issued by Purandar High School, Saswad and the mark-list of 10th class. The entries in the General Register maintained by the

College were based on the school leaving certificate and a duplicate copy of the school leaving certificate so submitted was given by the College to the brother of the appellant and the same was issued on the basis of the entry made in the General Register. It is at Exh.35-R and was issued for the first time on 5/6/2006. The date of birth of the appellant in the said duplicate certificate is shown as 6/7/1983. The witness in the cross-examination admitted that the entries in the General Register were not taken by him and he was not the Principal in the year 1999. The entry was taken by some clerk whose name he could not state. He also admitted that the appellant had appeared for the 12th standard examination but had failed. He also admitted that the appellant was for some time a student of Nav Bharat High School, Shivane while he was studying in the 8th standard, he was not aware about the date of birth of the appellant recorded in the said school. The second witness stated before the trial court that he was serving as Gram Sevak of village New Kopare between 1991 to 1995 and subsequently from 1/4/2002, whereas in the year 1983 Mr. P.D. Khullam was the Gram Sevak of village New Kopare and he was able to identify the hand

writing of Mr. Khullam. He stated that the birth certificate at Exh.35-V was issued by him on the basis of the entries made by Mr. Khullam in the year 1983. The said birth certificate at Exh.35-V is dated 26/5/2006 and it was in respect of Amit Nanasaheb Bhandwalkar and his date of birth recorded in the Birth Register is 6/8/1983. In the cross-examination he admitted that the register brought by him before the court was for the period from 11/11/1970 to 13/3/1981 and he subsequently clarified that it was upto 31/12/1987. He admitted that in the month of July 1983 there were two entries in the said register and none of them was in respect of Bhandwalkar. Those two entries of July 1983 were taken on 3/7/1983 and 25/7/1983 and were in respect of one child birth in the family of Shri Kakade. This witness admitted that the date of birth claimed by the appellant as 6/7/1983 did not find place in the register maintained by village New Kopare. In the cross-examination he admitted that Entry No.16 which did not carry the name and address of the person giving the information was written by him and in the said entry he had written the name of appellant for the first time on 26/5/2006. As per him, the date of birth of the appellant was

6/8/1983 and the certificate at Exh.35-V was issued on the basis of the application made by the brother of the appellant and marked at Exh.35-W. He also admitted that he had not signed the said entry taken in the register and he did not write the date of mentioning the name Amit.

3. The appellant's mother in her depositions before the trial court admitted that appellant was born at village New Kopare which was her parents' village and that he was born on 6/8/1983. She also admitted that Sushant, the fourth witness examined by the defence was her younger son and the appellant was the elder son. She admitted in the cross-examination that when her statement was recorded by the police during the investigations, she did not state that the appellant was born on 6/8/1983. She admitted that initially the appellant was admitted in the primary school at Kopare and thereafter he went to another school at Ambodi and could not state whether he was admitted in Nav Bharat School at Shivane. When she was asked about the date of birth of her second son Sushant, she stated she could not tell the same but he was born in the month of April and at Rasashala, Pune.

She admitted in the cross-examination that she was deposing with an intention to save her son from conviction and insisted that her son Amit was born on 6/8/1983. The last witness of the defence i.e. Sushant, the younger brother of the appellant reiterated that the appellant was born on 6/8/1983. He stated that he approached the village Panchayat, New Kopare for obtaining the birth certificate of the appellant and the birth certificate at Exh.35-V was issued giving the date of birth of the appellant as 6/8/1983. He also admitted that he had obtained school leaving certificate of the appellant before obtaining certificate at Exh.35-R. He also admitted in the cross-examination that no affidavit was filed in support of his application dated 26/5/2006 submitted to the Village Panchayat, New Kopare for correction of date of birth. He also admitted that in the school leaving certificate at Exh.35-R the appellant's date of birth was not shown as 6/8/1983.

4. In the oral depositions of the defence witnesses the prosecution could prove before the trial court that Shri Khedekar, the third witness examined by the defence, had fabricated the record and issued

the certificate at Exh.35-V solely on the application made by Sushant, the brother of the appellant. Even otherwise, the evidence of the appellant was not consistent. On one hand he claimed his date of birth as 6/7/1983 and sought the suport of the document at Exh.35-R, whereas his mother and younger brother claimed that the appellant was born on 6/8/1983 and supported the claim on the basis of the certificate at Exh.35-V.

5. The first witness of the prosecution Mr.Sudhakar Salunke, the Head Master of Nav Bharat High School, Shivane, stated that he was working in the said capacity since 1973 and the said school had primary as well as secondary sections. He stated that a boy who had not completed six years of age could not be admitted in the first standard as per the Government Rules. But when he was shown Rule No.128, he admitted that a boy could be admitted in the school on completion of five years and three months. On seeing the General Register maintained by his school, he stated in his examination-in-chief that appellant was admitted in 8th standard on 12/6/1995 and he had sought admission in the said school on the basis of

the school leaving certificate issued by primary school at Ambodi, Taluka Purandar. He further stated that on 31/5/1996 the appellant was issued a school leaving certificate and he left the same school. The extract of the original register and marked as Exh.35-AE was confirmed by him.

6. The prosecution has also brought on record the birth record register extract at Exh.35-AL of village New Kopare and it shows at Sr.No.16 that on 6/8/1983 a male child was born to Mrs.Shaila Nanasaheb Bhandwalkar but under the column of the male child's name there is clear interpolation and subsequently the name "Amit" has been written in Marathi. The claim of the prosecution that the said entry pertained to the younger brother of the appellant i.e. Sushant has some force and more so when in the said document in one of the columns it is specifically stated that the birth of the second child was recorded and certainly the prosecution proved that it was not the entry in respect of the present appellant and the original entry was made on 17/9/1983 as per the oral information given by the mother to the Peon. It is pertinent to note that when the prosecution asked a

specific question to the appellant's mother regarding the date of birth of her second son Sushant, she stated that she did not know the same.

7. Having regard to the evidence adduced by the appellant before the trial court it is clear that he failed to prove his date of birth being 6/7/1983 and there was a contradiction in his own evidence, whether the date of birth was 6/7/1983 or 6/8/1983. In addition, it is also evident that some certificates were sought to be placed on record after we had passed the order dated 5/5/2006 and some record was interpolated. There is no doubt that the onus of proving the date of birth to be 6/7/1983 was solely cast on the appellant and he failed to do so. As we have noted in our earlier order dated 5/5/2006 that the prosecution consistently maintained that the plea of the appellant being a minor was only taken by way of an after thought and at all stages before the trial court even till his statement was recorded under Section 313 of Cr.P.C., the appellant never took such a plea, namely, that he was below 18 years of age on the date the offence had taken place.

8. The learned counsel for the appellant placed reliance on the following decisions:-

(a) Umesh Chandra vs. State of Rajasthan [(1982) 2 SCC 202].

(b) Rajinder Chandra vs. State of Chhattisgarh and anr. [AIR 2002 SC 748].

. However, in the instant case the school entries sought to be proved through the first witness of the defence i.e. Shri Bhagwanrao Pawar failed to prove that the school entries were made on the basis of the school leaving certificate issued by either Nav Bharat High School, Shivane or two Primary Schools, namely, the Primary School at Ambodi and the Primary School at New Kopare. He was not in service when the entries were made in the General Register and he was not the person who made those entries. The Clerk, who made the said entries, was not examined. The second witness i.e. Shri Sanjay Khedkar, Gram Sevak of New Kopare, also admitted that the certificate at Exh.35-V was issued by him on 26/5/2006 and on the basis of the purported entry made by his predecessor in the year

1983. Under these circumstances, the judgments cited (Supra) on behalf of the appellant do not apply in the facts of this case.

9. On the other hand, the learned Special Public Prosecutor referred to the judgment in the case of Sushil Kumar vs. Rakesh Kumar **[AIR 2004 SC 230]** and pointed out that the burden of initial proof regarding the age was on the accused and the statements made by his own mother and brother emphatically stated that the accused was born on 6/8/1983. The entries in the school register could not be proved by examining the concerned Clerks/staff who had made such entries or on the basis of the school leaving certificates issued by the Primary Schools at village New Kopare and village Ambodi and, therefore, these documents do not meet the requirements of Section 35 of the Evidence Act and hence not reliable. We may usefully refer to a recent decision in the case of Ravinder Singh Gorkhi vs. State of U.P. **[(2006) 5 SCC 584]**, wherein the school leaving certificate was not an original one and it was merely a second copy. It was stated to have been signed by the Head Master on 30-4-1998 and it stated that the appellant was admitted on 1-8-1967 in the

school and his name was struck off from the roll on 6-5-1972. The Head Master had not admitted that the copy given by him was a true copy of the original certificate. It was also not shown whether any register was required to be maintained under any statute and the original register was not produced.

Their Lordships observed,

> "Determination of the date of birth of a person before a court of law, whether in a civil proceeding or a criminal proceeding, would depend upon the facts and circumstances of each case. Such a date of birth has to be determined on the basis of the materials on records. If will be a matter of appreciation of evidence adduced by the parties. Different standards having regard to the provision of Section 35 of the Evidence Act cannot be applied in a civil case or a criminal case."

. In the case of Birad Mal Singhvi vs. Anand Purohit **[1988 Supp SCC 604]** it has been held that to render a document admissible under Section 35, three conditions must be satisfied, namely,

(a) entry that is relied on must be one in a public or other official book, register or record;

(b) it must be an entry stating a fact in issue or relevant fact; and

(c) it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law.

It was further held that an entry relating to the date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded. This view is squarely applicable in the instant case because the certificates issued by the Primary Schools where admittedly the accused studied were not placed before the court nor the certificates which were placed before the court were supported by

the record from these Primary Schools. The person who made these entries purportedly were not examined and in any case some of the documents which were recently issued indicated the date of birth of the accused i.e. 6/7/1983, whereas in some other documents the said date to be 6/8/1983. Mr.Sawant the learned Special Public Prosecutor was, therefore, right in his submissions that by way of an after thought the accused was trying to find out some way or the other to get out of the clutches of the law and save himself from the sentence awarded by the learned Additional Sessions Judge.

10. In the premises, we uphold the findings recorded by the learned Additional Sessions Judge at Pune that the appellant - Amit @ Bapu Nanasaheb Bhandwalkar failed to prove that he was born on 6/7/1983 and was, therefore, of the age of less than 18 years at the relevant time.

11. Now coming to the issue of sentence. We have already held in our Judgment dated 5/5/2006 that the offence punishable under Section 302 read with Section 34 of I.P.C. has already been proved against the

present accused and accordingly we have convicted him for the said offence. Mr. Sawant the learned Spl.P.P. submitted that the sentence awarded by the Sessions Court in the order under appeal is adequate and he does not pray that the present accused be hanged until his death. We are, therefore, left with the only alternative to confirm the sentence awarded against the accused - Amit @ Bapu Nanasaheb Bhandwalkar by the learned Additional Sessions Judge in the order under appeal.

12. In the premises, we confirm the order of conviction and sentence passed by the learned Additional Sessions Judge at Pune in Sessions Case No.236 of 2001 against accused - Amit @ Bapu Nanasaheb Bhandwalkar and consequently dismiss this appeal.

(Smt.R.S. Dalvi,J.) **(B.H. Marlapalle,J.)**